United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1611

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

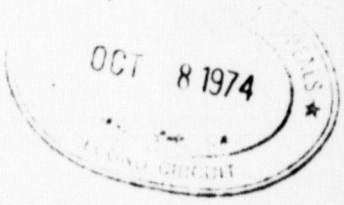
BP/s

No. 74-1611

REA EXPRESS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.



ON PETITION FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR INTERVENOR EMERY AIR FREIGHT CORPORATION

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BRIEF OF INTERVENOR EMERY AIR FREIGHT CORPORATION

STATEMENT OF THE ISSUE

Was the decision of the Civil Aeronautics Board ("Board") to terminate air express service pursuant to Sections 101(3) and 412(b) of the Federal Aviation Act of 1958, as amended, supported by substantial evidence as required by Section 1006(e) of that Act?

STATUTES INVOLVED

The statutory provisions which control the issues raised in the petition for review, Sections 101(3), 102, 412(b) and 1006(e) of the Federal Aviation Act of 1958, as amended (49 U.S.C. §§ 1301(3), 1302, 1382(b) and 1486(e)) are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

Emery Air Freight Corporation ("Emery") submits this brief in support of the several orders */ of the Board which have been challenged by REA Express, Inc. ("REA") in its petition for review. **/ Emery was a participant in the proceedings before the Board and was granted leave to intervene by this Court on June 17, 1974.

There are three classes of air cargo service available to the shipping public today -- air express, air freight forwarder air freight, and airline air freight. Air express is a

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*/ Express Service Investigation, Opinion and Order 73-12-36 and Supplemental Opinion and Order 74-5-25, Docket 22388; Investigation of Air Express Rates, Order Denying Consolidation 74-5-24, Docket 22387; and Discussions Concerning Industry-Wide Priority Air Cargo Service, Order Authorizing Discussions 74-2-118, Order on Reconsideration 74-4-1 and Order 74-5-74, Docket 26238.

**/ In addition to statements drawn from the record below, the factual statements contained herein are drawn largely from the decisions of the Board and, to a limited extent, the findings of the Administrative Law Judge. References to the various decisions and opinions are as follows: "Service I.D." -- the Initial Decision of the Administrative Law Judge in Docket 22388; "Service O" -- the Board's Opinion and Order in Docket 22388 (73-12-36); "Service S.O." -- the Board's Supplemental Opinion (74-5-25); "Order 74-6-118" -- Order Denying Motion For Stay Of Orders 73-12-36 and 74-5-25 in Docket 22388; "Rates I.D." -- Initial Decision of the Administrative Law Judge in Docket 22387; "Rates O" -- the Board's Opinions and Orders in Docket 22387 (74-5-23 and 74-5-24). References to the record are as follows: "Service Exhibit" -- exhibits in the Service case; "Service Tr." -- transcript in the Service case.

combined service of REA and the scheduled air carriers, which is provided on a monopoly basis pursuant to two inter-carrier agreements. */

The last air express agreement was due to expire on June 30, 1969, but was extended while negotiations for a new agreement were conducted. The negotiations, however, were unsuccessful **/ and on April 9, 1970, REA filed a petition and complaint with the Board requesting a permanent air express arrangement with the airlines and arbitration of future disputes if negotiations proved unsuccessful, authority for REA to file its own air express tariff independent of the airlines, and assurance through Board oversight that airline charges to REA were fairly related to charges for other types of cargo.

The Board in Orders 70-7-109 and 110 dismissed REA's petition and complaint and initiated two proceedings -- the Express Service Investigation, Docket 22388 ("Service case") and the Investigation of Air Express Rates, Docket 22387 ("Rates case"). ***/

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*/ The first agreement organized the airlines into a collective bargaining unit. The second agreement, the air express agreement, establishes the relationship of REA and the airlines in providing air express service.

**/ Air express service is currently being provided pursuant to a revised agreement which will continue in effect until 6 months after the date of final disposition of either the Express Service Investigation or the Express Rates Investigation (Agreement C.A.B. No. 17935, as amended). Pursuant to the agreement, any airline or REA may withdraw from the agreement by giving 6 months prior written notice to the other parties.

***/ REA appealed dismissal of its petition and complaint to this Court. On March 15, 1971, this Court dismissed the appeal as moot.

After almost two years of proceedings, on May 25, 1972, the Administrative Law Judge rendered a decision in the Service case, concluding that the air express service provided by REA was essential to the public interest and that air express was distinguishable from other air cargo services.

The Board in Order 72-6-27, on June 6, 1972, exercised its right of discretionary review of the Initial Decision of the Administrative Law Judge in the Service case. After briefs and full oral argument, the Board, on December 7, 1973, issued Order 73-12-36 disapproving the prior agreements providing for air express service between REA Express and participating scheduled airlines, and terminating the exemption authority of REA Express to conduct air express service. The Board set June 5, 1974 as the effective date of this order to provide for orderly phase-out. Further, the Board awarded REA Express air freight forwarder authority. The Board's order recognized the need for expedited service in limited situations and encouraged the establishment of an alternative system of priority service on a non-monopoly basis which the airlines could offer in their tariffs. In furtherance thereof, on February 27, 1974, the Board in Order 74-2-118 authorized discussions among the airlines for the purpose of establishing this limited priority service.

On January 2, 1974, REA petitioned for reconsideration of the December 7, 1973 order. On March 26, 1974, REA in a motion to the Board asked for a postponement of the termination date for air express service from June 5, 1974 to January 31, 1975.

The Board on May 6, 1974, in Order 74-5-25 denied REA's petition for reconsideration, but postponed the termination of air express service until July 31, 1974.

The Initial Decision by the Administrative Law Judge in the Rates case was rendered on May 1, 1972. The decision rejected REA's argument that air express rates should bear the same relationship to air express costs as freight rates to freight costs. (Rates I.D. 80, J.A. 471(a)) The Administrative Law Judge rejected REA's arguments that it had been underpaid and that it was entitled to a retroactive adjustment of the division of air express revenue. On January 31, 1974, REA moved the Board to consolidate the Rates case with the Domestic Air Freight Rate Investigation, Docket 22859 ("Freight Rate" case).

Upon review of the Rates decision, the Board on May 6, 1974 in Order 74-5-23 held that in view of the decision reached in the Service case "no useful purpose would be served by . . . attempting to resolve the disagreement between REA and the direct air carriers concerning the amounts to be paid over to the latter

from revenues to be received under lawful prospective rates for express." (Rates 0. 1-2, J.A. 774(a) - 775(a)) In terms of retroactive adjustment of the divisions of air express revenues, the Board found the record to be inadequate to determine whether the revenue divisions were accurate. Consequently, the Board instructed the parties to meet in an informal conference to attempt to reach an overall agreement in the division of past revenue received. Also on May 6, 1974, the Board in Order 74-5-24 denied REA's motion to consolidate the Rates and Freight Rate cases.

On May 7, REA filed its petition for review in this Court and shortly thereafter formally moved before the Board for a stay of the Board's orders in the Service and Rates cases pending judicial review. The Board on June 26, 1974, denied REA's motions (Orders 74-6-117 and 74-6-118) and on July 5, REA petitioned this Court for a stay of the Board's orders. This Court, on July 16, 1974, granted the stay pending judicial review.

SUMMARY OF ARGUMENT

The decision of the Board to terminate the monopoly air express authority of REA was supported by substantial evidence. The Board correctly rejected REA's alternative proposals to save air express service and did not err in separating the Rates and Service cases.

ARGUMENT

I. The Board's Decision Is Consistent With The Mandate Of The Federal Aviation Act.

Section 101(3) of the Federal Aviation Act ("Act") (49 U.S.C. § 1301(3)) provides that the Board:

> " . . . may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest."

Section 412(b) (49 U.S.C. § 1382(b)) of the Act provides that the Board:

> " . . . shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

Taken together, the above quoted statutes provide the basis for the Board's action in the instant case. The Board, acting under

the authority granted it by Section 101(3), terminated the exemption authority of REA to conduct air express service. Acting pursuant to Section 412(b), the Board disapproved the agreements providing for air express service between REA and participating scheduled airlines. */

Section 1006(e) of the Act establishes the standard of review for this Court:

> "The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. . . ."

Consequently, the limited question presented to this Court is whether the Board's decision is supported by substantial evidence.

The record clearly supports the Board's conclusion that the termination of the air express monopoly of REA is in the public interest. REA, however, strenuously argues before this Court that the Board's decision to terminate air express is contrary to the public interest and not supported by adequate evidence in the record. Thus, it is necessary to examine the evidence supporting the Board's decision.

A. The Board's Duties are to Evaluate its Statutory Mandate in the Light of Present Circumstances and to Recognize Changed Conditions.

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*/ In addition, the Board granted REA air freight forwarder authority and found that scheduled airlines have an obligation to offer priority service as part of their duty to provide adequate interstate and overseas air transportation.

In 1948 in the Air Freight Forwarder Case, */ the Board had occasion to determine whether substantial differences existed between air express and air freight. It found, at that time, that such differences existed.

> "The difference between air express and air freight lies principally in the ground and accessorial services provided and in the amount of the rates charged shippers for the respective services. Air freight is carried at rates usually less than half those assessed against air express." **/

While distinctions did exist in 1948, they have vanished in the twenty-six years since that decision. Shippers using air freight today receive the entire scope of ground and accessorial services given to users of air express, and in many cases receive more and better services than provided by air express. As the Board correctly noted:

> "This decision marks a change from the Board's 1948 conclusion that 'the public interest requires the continuance of [REA's] air express service.' That finding, which was not meant to be binding for all time, reflected the infant state of the new air freight industry. Until 1944, all air cargo was carried as air express. The first airline began carrying air freight (as distinct from air express) that year; and the first forwarders were authorized to begin operations in 1948. Standing then at the beginning of a

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*/ 9 C.A.B. 473 (1948).

**/ Id. at 481.

> new era, the Board could not know that twenty-five years hence REA would be nearly destitute, that the newly-authorized forwarders would be offering fast, comprehensive service, that REA would be unwilling to continue nation-wide express service except with drastically expanded authority, and that the likelihood would be low that REA could continue its existing service even were that new authority to be granted. As a result of these developments, the Board no longer has the option to continue express service in the format contemplated in 1948, and consequently, cannot reach the same conclusion." (Service 0. 6-7, J.A. 669(a)-670(a), footnote omitted)

It is a well settled principle that regulatory agencies do not establish rules of conduct to last indefinitely; instead, they are charged to adapt their rules and practices to the ever-changing needs of our society. As the Supreme Court said in American Trucking Ass'n v. Atchison, Topeka & Santa Fe R.R., 387 U.S. 397, 416 (1967):

> "[Regulatory agencies] are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

1. Air express no longer serves a unique function.

REA argues on a number of grounds that its air express services are still as "unique" as they were in 1948, and thus

fulfill a special need today as they did in 1948. The Board correctly concluded that air express no longer furnishes unique services.

> "In the early days of air freight, air express did possess many service advantages over conventional air freight. Many of those advantages no longer exist; others are likely to disappear soon; and the remainder can be achieved through other means." (Service 0. 13, J.A. 676(a))

In careful findings supported by substantial evidence the Board rejected REA's arguments that its service was unique.

a. "Priority" has become meaningless.

There was a time when the priority of boarding afforded by the airlines to air express over air freight had real meaning, when the airlines were using small weight-limited aircraft, and when all-cargo service was not available and frequency of service was at a low level. Priority was, in fact, a concept created to cope with the inherent disadvantages of the DC-3 as a cargo carrier. Now, all-cargo service exists in major markets, the cargo capacity of combination aircraft is much greater, and frequencies are so numerous that the Board has authorized capacity reduction agreements among carriers.

All of the evidence in this case, including REA's own evidence, demonstrates that, in terms of performance, the concept of "priority" is now meaningless. REA does derive advertising

benefits from the concept when it tells the shipping public that it exclusively offers "priority" service; the claim, however, produces no better performance for the public. This is one of the factors that the Board legitimately could and did consider in determining whether in the public interest air express service should be abolished.

> "The air express arrangement has long provided that the airlines will give space priority on aircraft to express shipments. In 1948, when air cargo space was very limited, the Board found that priority was a distinguishing characteristic of air express. But circumstances have changed. While the amount of cargo moving by air has increased dramatically, the amount of cargo space operated by the airlines has increased even faster. Thus the problem today is not finding cargo capacity, but filling it." (Service 0. 15-16, J.A. 678(a)-679(a), footnotes omitted)

The Board buttressed its conclusion on excess capacity */ by citing a study conducted by the airlines. **/ The survey outlines the effect of excess cargo capacity on the value of the priority accorded air express. The study showed that only one out of every 58 flights departed without sufficient space to accommodate the cargo intended for the flight. In gross numbers, 37,500

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*/ The excess of cargo capacity is demonstrated by the exhibit which shows that 57.8% of the available ton-miles on the domestic trunk carriers and 60.2% of the available ton-miles on local service carriers were unused in 1970. (Service Exhibit EAF-19, S.A. Sect. I) Appellant inadvertently omitted this exhibit and Order 74-6-118 from the Joint Appendix although both were designated by parties to this proceeding. Appended hereto as a Supplementary Appendix to this brief are EAF-19 (S.A. Sect. I) and Order 74-6-118 (S.A. Sect. II) with original pagination.

**/ Service 0. 16, J.A. 679(a), n. 17.

flights were surveyed and only 650 left cargo behind because of full cargo holds. */ Even REA has conceded that the utility of the priority provision in the air express agreements is very limited. **/

Certainly, freight may be displaced by express in some limited instances. Even those limited number of flights, however, that left air freight behind may well have left air express and air mail behind as well. (Service Tr. 265, J.A. 1783(a)) Similarly, the survey did not differentiate the circumstances where freight was left behind due to en-route weather delays. (Service Tr. 266, J.A. 1784(a)) Finally, the survey did not include any all-cargo flights. In short, no evidence introduced in this proceeding shows that any substantial amount of air freight is displaced by the "priority" afforded air express.

b. REA's alleged broad geographic coverage has diminished and is continuing to diminish; REA is free to abandon service at any point at any time.

REA has argued before the Administrative Law Judge, the Board, and now before this Court, that it "serves" hundreds of

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*/ It is true as the Administrative Law Judge noted that the study was conducted during a non-peak traffic period. (Service I.D. 33, 48, 52; J.A. 604(a), 619(a), 623(a)) However, as the Board correctly noted it is very questionable whether the percentage of flights departing with cargo holds full during peak periods would be materially different from the survey cited above. (Service O. 16, J.A. 679(a) n. 19)

**/ See Rates I.D. 38, J.A. 435(a).

hamlets and villages across America, providing broader geographic coverage than air freight.

In support of this contention, REA submitted an exhibit entitled "Communities In Which REA Maintains Offices But Air Freight Forwarders Do Not." (Service Exhibit REA-326, J.A. 1571(a)) This exhibit listed 2,973 communities. Emery, in response, submitted an exhibit which showed the results of a telephone survey conducted of these alleged offices. (Service Exhibit EAF-R-26, J.A. 1301(a)) The survey showed that for 2,030, or more than two-thirds of the alleged offices, there was no local telephone listing of Railway Express, REA, or Air Express, or else there was only an enterprise listing of some REA office located elsewhere. */ Similarly, Emery showed that 74 of the 600 communities listed in the REA exhibit, where REA claimed to maintain salaried offices, had no local telephone numbers. Indeed, 17 of the 283 airport communities listed in the exhibit had no local phone listings. On cross-examination, REA admitted that 510 of the 2,973 offices had been closed as of October 1971, and that further closings were contemplated. (Service Tr. 2057-2058, J.A. 1964(a)-1965(a)) Presumably, such closings are still occurring.

Perhaps even more important, the nature of the service, at whatever number of REA offices may actually exist today, has drastically changed since the Board in 1948 found that REA served a large number of points not served by anyone else. Even at

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*/ An enterprise number is one located in a city different from that in which it is listed.

points where REA still maintains an office, no air express service may be offered. Such locations may in fact be served by cities which are hundreds of miles away. The record shows, for example, that on cross-examination an REA witness admitted that one point allegedly served, Colville, Washington, is actually served through Seattle, more than three hundred miles distant. (Service Tr. 2094, J.A. 1968(a)) An Emery witness testified that in certain instances air express service was provided to certain points by truck on a twice a week basis (American Falls, Idaho), or, indeed, only when the truck is loaded, with no schedule (Bastrop, Louisiana). (Service Tr. 2661, J.A. 2001(a))

Substantial evidence in the record proves that REA's broad historical geographical coverage is a thing of the past. As the Board correctly concluded:

> "For REA's historic broad geographic coverage is clearly a relic of the past. Not only is REA already consolidating its service, but it must soon retrench if it is to survive. As REA concedes, it will pull out of many small communities unless it can improve its profitability by means of expanded authority." (Service 0. 19-20, J.A. 682(a)-683(a))

The record as a whole shows that REA, because of its deteriorating financial position, has for the past few years been in the process of consolidating its geographic coverage and, therefore, lessening the area and number of locations that it serves. REA has been and is under no mandate to serve any

given point and thus, consolidation is governed solely by the economics of the business.

Moreover, the geographical coverage of air express service is being seriously affected as airline after airline pulls out of the air express agreement with REA. To this date, eight airlines have given notice to REA that they are withdrawing from the air express agreement. These airlines and their respective dates of withdrawal are:

Delta	-	June 14, 1974
Southern	-	June 14, 1974
North Central	-	July 2, 1974
United	-	November 29, 1974
Piedmont	-	November 29, 1974
Ozark	-	December 26, 1974
Continental	-	December 28, 1974
Northwest	-	December 31, 1974

(Airline Intervenors Brief, p. 3, n. 2)

The cumulative effect of these withdrawals on air express service is serious. As the Board noted with regard to the withdrawal of only four carriers:

> "In 1973, those four carriers -- Delta, North Central, Southern, and United -- accounted for 35 percent of all air express traffic. Of the 500 or so points in the United States receiving certificated air service, about 100 receive such service only from one or more of those four carriers." */ (Service S.O. 15, J.A. 800(a))

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*/ "Ft. Wayne, Ind. is served only by Delta and United; Meridian, Miss., by Delta and Southern; and Flint, Lansing, Muskegon, and Saginaw/Bay City/Midland, Mich., by North Central and United. Each of approximately 90 other points are served only by one of the four carriers." (Service S.O. 15, J.A. 800(a), n. 18a)

Of course, the withdrawal of eight major carriers from the air express agreement brings into question not only the geographical coverage of air express, but indeed, the continued viability of air express service itself. */

In contrast to REA's unquestioned and conceded reduction in locations served, the geographic coverage of air freight has expanded in recent years.

From 1948, when air freight forwarders were authorized to begin operations, until today, air freight service provided by forwarders has spread across the country to the point where it now rivals, or exceeds REA's geographic coverage. On this point, the Board noted:

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*/ For example, Delta (DL), Southern (SO), North Central (NC) and Northwest (NW) provide the only direct service in a number of significant markets:

Columbus, Ga.-Washington, D. C.	(SO)
Memphis-New Orleans	(DL, SO)
Memphis-Chicago	(DL, SO)
Memphis-St. Louis	(DL, SO)
Memphis-Miami	(DL)
Memphis-Indianapolis	(DL)
Minneapolis/St. Paul-Portland	(NW)
Minneapolis/St. Paul-Spokane	(NW)
Atlanta-Savannah	(DL)
Atlanta-Cincinnati	(DL)
Atlanta-Detroit	(DL)
Atlanta-Charleston, S. C.	(DL)
Kansas City-Sioux City	(NC)

Order 74-6-118, App. at 1, S.A. Sect. II.

> "The larger forwarders also offer service to virtually every air carrier airport city, and serve about as many cities with exclusive stations as does REA: 66 for Emery, 56 for Airborne, and 69 for REA. When the forwarders' intermodal service is added to the picture, their systems are comparable to REA's." (Service O. 18, J.A. 681(a), footnotes omitted)

This finding is substantiated by the record. For example, Emery, the largest air freight forwarder, currently has a pickup and delivery tariff which lists service at a total of 6,706 points in the United States. (Service Exhibit EAF-R-T-4 at 5, J.A. 1337(a)) In comparison, REA's air express tariff shows only 5,956 points within terminal areas where air express services, including pickup and delivery, are provided. (Id.) Thus, just one forwarder has broader geographic coverage than does REA in terms of availability of air express. The combined services of all direct carriers and all forwarders are far greater.

In addition to forwarders, the airlines provide air freight service to many points. The airlines and their connecting motor carriers currently list 8,558 points across America where pickup and delivery service is available.

As the Airline Intervenors point out in their brief to this Court, the airlines' air freight service is coextensive with air express service both in terms of the certificated airline points served and in terms of air freight pickup and

delivery services provided. As the Airlines state at pp. 32 and 33 of their brief:

> "Today air express moves between all 500 or more certificated airline points. The airlines' own airfreight service likewise moves between all of those same points. [T]he geographic scope of air express service is not determined by REA. It is determined by the points named in the airlines' certificates of public convenience and necessity. Those same points would apply to the airlines' priority air cargo service.
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> . . . .
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> "The fact of the matter is that the airlines provide airfreight pickup and delivery service for airfreight at every point in the United States they are certificated to serve and throughout the terminal areas surrounding those points, and such service is set forth in the airlines' tariffs on file with the Board. The airfreight pickup and delivery services of the airlines are co-extensive with the pickup and delivery services provided for air express under the air express tariff on file with the Board." (Footnotes omitted)

If air express service were to continue, the financial pressures on REA and the withdrawal of carriers from the air express agreements would result in further curtailment of geographical coverage. In contrast, air freight forwarders are engaged in a significant expansion of geographical coverage, with the result that when air express is terminated, there will be few, if any, gaps in geographic coverage. Moreover, what few gaps might exist will quickly be covered by air freight forwarder expansion. The Board found:

> ". . . it is our judgment, based upon the evidence of record and the history of the air freight forwarder industry, that many (if not all) gaps in geographic coverage resulting from a termination of air express will be quickly filled by freight forwarder expansion. The record is replete with evidence of air freight forwarder plans to that effect. And air cargo industry economics make it most likely that those plans will bear fruit." (Service O. 18-19, J.A. 681(a)-682(a), footnotes omitted)

REA, in its brief to this Court, seeks to establish the proposition that the Board was merely "speculating" when it concluded that few communities would go unserved as a result of the termination of air express -- and that the Board's conclusion was "flatly contradicted by overwhelming evidence." Such is hardly the case. Emery itself is prepared to bridge any gaps in air freight service that might result if REA discontinues operations. */ The Board was justified in relying on this statement by the largest air freight forwarder:

> "Emery is prepared to assume [the responsibility in] its present tariff to provide [transportation for] all of the commodities that are presently found in the current air express tariff, and further to add all of the points that are not presently in

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*/ Such the Board noted in its Supplemental Opinion:

> ". . . air freight forwarders with nationwide systems, such as Emery, remain willing and able to fill such service voids, and we note that eleven longhaul motor carriers (many of which are nationwide companies) have recently filed for renewal of their air freight forwarder authority." (Service S.O. 7, J.A. 792(a), n. 9)

> Emery's air freight forwarding tariff in order that there can be a continuation of the same type, scope, commodity and points of service as is presently contained in REA's air express activities. . . . [Service] Tr. 2663-2664." (Service 0. 19, J.A. 682(a), n. 26)

Other forwarders can be expected to take similar steps. Airborne, for example, a major air freight forwarder, stated in these proceedings that if the Board permitted it to offer express-type service it would convert its 141 destination agencies to outbound generating points. Airborne further anticipates that in one year it would set up a total of 400 generating points for both conventional air freight and high priority traffic. The Air Freight Forwarders Association also stated in these proceedings that other air forwarders represented by it contemplated similar expansion. */

c. REA's commodity coverage and provision of special services are generally duplicated by others, and in any event depend on the willingness of direct carriers to carry the commodity.

REA has argued strenuously, both in Board proceedings and before this Court, that it transports certain commodities, and provides certain services which no one else provides. REA,

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*/ Service Tr. 2261-2262, cited in Service 0. 19, J.A. 682(a), n. 26.

however, cannot transport any commodity which the direct air carrier involved in the transportation is not willing to carry. It is correct that forwarders currently do not accept certain shipments which REA does carry. For example, REA will carry most animals, whereas Emery's tariff limits its carriage to animals being used for scientific or medical purposes. In terms of special services, Emery provides the bulk of the services provided by REA today. In fact, there is only one service which REA provides which Emery does not -- armed guard service. However, Emery has stated to the Board that it will provide this service if the express category of freight is abolished.

The reason forwarders have refrained from transporting certain commodities to date is simply that REA is providing the services at an uneconomic pricing level. */ However, if the Board's decision is upheld by this Court, Emery has made it clear to the Board that it would be willing to transport all commodities which REA now handles, but at prices compensatory both to it and to the direct air carriers. There is no doubt other forwarders would take similar steps.

The Board, in dealing with the issue of commodity coverage, determined that REA presently offers air express service for only about eighteen items for which the airlines and forwarders do not provide air freight service. (Service O. 20, J.A. 683(a))

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*/ In fact, one reason why REA is in serious financial straits is that it carries certain commodities at uneconomic price levels.

Thus, according to the Board, in all but a fraction of the millions of shipments moving in air transportation, REA's commodity coverage is coextensive with that of the forwarders and the airlines. */ The Board found that even these eighteen commodities which REA now carries exclusively would not lose service as a result of the ending of air express. (Id.) REA, of course, would be fully authorized to continue to handle all its commodities as an air freight forwarder, and even if REA refused to do so on business grounds, such commodities could be handled by the direct air carriers and other air freight forwarders.

The Board dealt at length with the commodity coverage issue. A glance at the Board's decision will illustrate that other air cargo services will fully meet the needs of special shippers, such as those who ship live animals and birds or require security services, items which were singled out for special emphasis by the Administrative Law Judge. "In the future these shippers should be able to use either the forwarders, including REA, or the airlines for the entire operation." (Service O. 21, J.A. 684(a))

REA, however, makes a lengthy argument in its brief to this Court that there will be an injurious gap in the transportation of valuables or other commodities covered by REA's security services. Emery has stated to the Board, and now

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*/ Similarly, the record shows that the number of commodities carried only by REA will be reduced as REA continues to restrict its services to improve its serious economic position. (Service O. 20, J.A. 683(a), n. 28)

states to this Court, that it will provide this service if the express category of freight is abolished. In addition, specialized carriers are now providing security service comparable to REA's. Wells Fargo Air Express, for example, indicated to the Board that it would specialize in express-type transportation of currency, coin, gold and silver bullion, securities, jewels and other valuables. */ The Board concluded that this service would be similar to, and in some cases, superior to REA's service.

The Board's conclusion that "no commodity will be precluded from moving by air" is fully supported by the evidence in the record. (Service 0. 22, J.A. 685(a)) There will be no adverse effect on commodity coverage if air express service is terminated.

d. Air freight forwarder service is at least as fast as air express service.

REA has urged that air express offers unique advantages in that it is faster than other forms of air cargo. The Board concluded that the weight of the evidence showed that air express generally is not faster than air freight forwarder service and in fact is often slower.

Forwarders such as Emery in response to competition have developed services and operational techniques that are at least comparable, and in some instances, superior to express

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*/ Brinks, Inc. has recently applied for air freight forwarder authority. (Service 0. 22, J.A. 685(a))

service. First, both services provide for the shipment to be picked up and placed aboard aircraft on the same day and to be delivered at the destination the next day when airline schedules reasonably permit; otherwise, on the second day. Second, both forwarders and REA tender shipments to airlines throughout the day to achieve maximum speed of delivery. Third, air freight ground handling is just as fast as express service ground handling. Fourth, the speed of delivery is not affected by the priority feature of express.

These conclusions reached by the Board find ample support in the record made before the Administrative Law Judge. The record shows that Emery conducted a survey of its shipments and those of REA in September 1970 long before this case began and not for the purposes of this proceeding. (Service Exhibit EAF-21, J.A. 1299(a)) In the survey, Emery and REA were both tendered one shipment a day for three succeeding days in sixteen identical city pair markets. Emery achieved next-day delivery for 42 shipments while REA achieved such delivery for only 33 shipments. (Id.)

REA conducted its own study, the results of which confirm the findings of the Emery study. (Service Exhibit REA-352, J.A. 1606(a)) The REA study was organized by REA and used customers who routinely use its services. The results of the REA study are set forth in the following table:

ELAPSED TIME FROM PICKUP TO DELIVERY
OF TEST SHIPMENTS

REA AIR EXPRESS VS. EMERY AIR FREICHT

Elapsed Business Days	% of Total REA Air Express	Emery Air Freight
1	45.8%	47.1%
2	41.7%	47.1%
3	9.0%	5.0%
4	2.1%	.7%
5	.7%	-
6	.7%	-
TOTAL:	100.0%	100.0%

Even in the face of these surveys, REA argues that air express is faster since it does not delay shipments in order to consolidate them as it states air freight forwarders do. Consolidation is simply a way whereby several small shipments can be consolidated into a single larger shipment, thus allowing the advantage of lower rates for higher weight breaks and diminishing handling costs and paper work for the airlines. But the fact that some shipments are consolidated does not mean that they are held for consolidation in the sense of being delayed as the above survey demonstrates.

The Board, relying on the extensive record developed before the Administrative Law Judge, agreed that air express is not faster than air freight forwarding.

> "Elapsed time surveys conducted by the parties support the conclusion that air express is simply not faster than air freight. While these surveys have a number of failings, they nevertheless do indicate that in the nation's major markets, at least, REA's services do not produce an elapsed time distinguishable from other air freight services. . . . Summarized here, the surveys showed that the majority of air express and air freight shipments received next-day service, and nearly all shipments received at least second-day service. Indeed, Emery's survey showed that Emery provides faster door-to-door service than REA; and REA's own survey, using REA's own standards, corroborates Emery's." (Service 0. 15, J.A. 678(a))

In summary, the Board's finding that air express currently provides no unique service to the shipping public is amply supported by the record. The public interest will be furthered by the termination of air express service and no public need will be sacrificed if express service is abolished. The broader geographic coverage given in the past has already disappeared by virtue of REA's consolidation program, and this process will continue. REA is under no mandate to serve any given place, and obviously does not intend to serve unprofitable points. In contrast, air forwarders are continuing to broaden their geographic areas of activity and have recently moved to vastly increase their access to off-airport origin and destination points. Similarly, no speed of service will be lost. The record conclusively demonstrates that express service does

not achieve faster delivery services than service by a good air freight forwarder. Finally, no commodity will lose air service because Emery and others are committed to carry all types of traffic which now move in express service. Thus, the public interest of the shipping public will not be harmed, but will be advanced, when air express service is abolished as the Board ordered.

2. Alternative priority service is proposed for certain limited commodities.

The evidence contained in the record in this proceeding amply proves that the priority service allegedly provided by REA is largely a meaningless concept. However, in reaching this conclusion, the Board acknowledged that for a certain very limited number of commodities and shippers, truly expedited, priority service is useful. Accordingly, the Board proposed a service reasonably designed to meet this need which will differ totally from the existing air express priority system in that it will be available for the transportation of only certain commodities, it will provide a truly priority service, and it will not be provided on a monopoly basis. Also, the new system as contemplated by the Board will guarantee fast service.

REA in its brief to this Court argues that the Board "wildly" postulates a paper service which is only "hypothetical,"

and which in any event would be unworkable. However, no party seriously contends that air express can be continued in its present form. As the Board noted:

> ". . . the air express system in its historic form cannot continue. Thus a break with the past is inevitable. In these circumstances prediction of the likely effects of at least partially untested ways of providing service to the public -- or what REA calls 'speculation' -- becomes unavoidable; and we reject REA's thesis that we are legally precluded from acting on our judgment of what the future is likely to bring." (Order 74-6-118 at 7, S.A. Sect. II)

A careful examination of the Board's proposal will show that it is well designed to meet the needs of the limited number of shippers for which such service would be useful and that the airlines will establish this system. The Board, in setting out this system, stated:

> "The evidence before us shows that notwithstanding the considerations discussed above, highly expedited service that gets priority treatment is useful to various shippers, and that they use air express to satisfy these requirements. Upon consideration of the record herein, we find ourselves in agreement with those shippers that there is a need, albeit a very limited one, for service of that nature. We have further concluded that such a need can and should be met through the publication of high-priority tariffs by the various direct air carriers." (Service O. 17, J.A. 680(a))

To accomplish this end, the Board concluded:

> "We think that these considerations lead inescapably to the conclusion that, as part of the airlines' duty to provide reasonable transportation, they are under an obligation to offer highly expedited priority service under tariffs so providing." (Service O. 38, J.A. 701(a))

As a result of this directive from the Board, twenty-eight airlines jointly petitioned the Board for authority to discuss the creation of such a priority air freight service and by Order 74-2-118, dated February 27, 1974, the Board authorized such discussions with appropriate restrictions to ensure fairness. Representatives of the various airlines have since met several times and, as the Airline Intervenors state in their brief to this Court:

> "As a result of these meetings, the airlines have produced the draft of an 'Interline Air Express Forms and Procedures Agreement' providing for the procedures to be followed by the airlines and the shipping forms and documents to be used by the airlines in handling interline priority air cargo shipments. Several of the airlines have also undertaken procedures to establish joint terminal facilities at approximately twenty-five major airports to be operated by a third party, as agent of each such airline, for accepting, delivering, and interchanging priority air cargo on behalf of each such airline." (Intervenor Airlines Brief 30 - 31)

Order 73-12-36 provides an adequate and reasonable solution to the "very limited need" of certain shippers for

priority service. The inter-airline discussions have produced good progress toward an efficient system for handling the relatively limited priority requirements.

B. REA Constitutes a Monopoly Which is Inconsistent With the Mandate of the Act Requiring the Board to Foster Competition.

The Federal Aviation Act establishes competition as an element to be considered in determining the public interest. Section 102 of the Act directs the Board to consider:

> "Competition to the extent necessary to assure the sound development of an air-transportation system . . ."

There is no doubt that the air express agreements are anti-competitive:

> "The air express agreements are plainly anticompetitive, and have the effect of eliminating competition between airlines and excluding airfreight forwarders from various types of markets. As we have elsewhere discussed, the air express agreements do not produce counter-balancing public benefits, but rather stand in the way of the establishment of an improved air cargo system." (Service S.O. 12, J.A. 797(a), footnote omitted)

Over the past quarter century, the Board has made great efforts to ensure competition in the air transportation system of the United States. It has certificated competitive direct carriers on every substantial route sector in the United

States. It has provided U.S. carrier competition in all major international markets, in spite of the fact that competition from foreign carriers exists in those markets.

Over time the goal of competition has been even more assiduously followed by the Board in its authorization of indirect carriers. Thus the Board has not embraced a rule of limited entry to protect air freight forwarders.

In the face of the mandate of the Federal Aviation Act to consider competition as an element in its evaluation of the public interest, the Board has permitted one class of traffic to be monopolized. That monopoly is air express, a class of traffic where the airlines do not compete one with another and where they employ a single agent (REA) which exclusively sells this service to the public. */

The Board recognized this fact in its order terminating REA's air express authority:

> "REA's monopoly control over air express has always been an anomaly in an air transport system enjoined to preserve '[c]ompetition to the extent necessary * * *' (49 U.S.C. 1302). REA was originally licensed as the exclusive ground agent for

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*/ Under the air express system as it currently exists, all airlines carry express and all are parties to the air express agreement. None of them advertises their own express service to the public. There is no rate competition between carriers for air express traffic and very little competition of any other kind. Moreover, the air express agreement operates in such a fashion that traffic is divided as between carriers operating competitive services within the fifty-nine minute time frame.

> air express on a temporary basis. It has been allowed to linger in that status because there was 'no substitute available.'" (Service 0. 33, J.A. 696(a), footnote omitted)

Today, as the record shows, there are substitutes for the joint REA-airlines air express arrangement. In fact, such substitutes "exist in profusion."

Thus the Board eliminated the monopoly relying, as the Act directs, on the forces of competition:

> "Whether we try to perpetuate the present system through some modified form of monopoly, or whether we open the door to the forces of competition, the methodology for expedited shipping of small packages must undergo a profound -- and not entirely predictable -- transformation. Recognizing that some uncertainties are thus inevitable, the Board prefers to trust in competition, rather than monopoly, as the agent of change. For our regulatory experience has always tended to show that the free play of competition has stimulated the development of air cargo." (Service 0. 33, J.A. 696(a), footnote omitted)

This reliance by the Board on the forces of competition as the decisive factor is fully in accordance with Section 102. In fact, should the Board have held for a continued monopoly, in the light of the alternatives now available, it would have acted contrary to the mandate of Section 102 to preserve competition to the extent necessary. The Board was fully aware of this problem:

> "Disapproval of the air express agreements is fully in keeping with the spirit of the antitrust laws. It is the perpetuation of them that would have been contrary to that spirit." (Service S.O. 13, J.A. 798(a))

The Board properly followed its statutory mandate by injecting competition into this phase of air transportation and by terminating the air express monopoly of REA and converting REA into an air freight forwarder.

II. The Board Was Correct In Not Considering Rate Levels For Air Express In The Express Service Investigation.

REA argues before this Court that the Board's decision to bifurcate the Air Express Proceedings into a Rates case and a Service case disrupted the orderly presentation of the relevant issues and rendered the decision fatally defective, and contrary to the Act.

First, REA did not object at the proper time to the Board's action by asking that the two proceedings be consolidated. When the Board originally established separate investigations into express rates and express service (Orders 70-7-109 and 70-7-110), REA did not file a petition for reconsideration, nor did REA at any time file a motion for consolidation of these two proceedings. Consequently, pursuant to Section 1006(e) of the

Act */, REA cannot now be heard to complain of the structure of the proceedings below since it has advanced no reasonable grounds for its failure to object. (Air Line Pilots Assn. Int'l v. CAB, Civil No. 73-1214 at 8 (D.C. Cir. August 8, 1974); Frontier Airlines, Inc. v. CAB, 439 F.2d 634 (D.C. Cir. 1971))

Second, the two proceedings instituted as a result of REA's petition and complaint merely reflect the two major issues raised -- one, what the division of revenues should be between REA and airlines and, two, what the nature of air express service should be. It is well settled that the Board has considerable discretion in establishing procedures for carrying out its statutory obligations. Under Section 1001 of the Act the Board is vested with authority to conduct its "proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." See, CAB v. State Airlines, Inc., 338 U.S. 572 (1950).

Third, it would have been futile to delay a decision in the Service Investigation pending the termination of the Rates case. REA, in fact, conceded this in argument in the Service case before the Board:

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*/ Section 1006(e) states in pertinent part:

> ". . . No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so."

> "I find it very hard to believe that even if the Examiner's decision in the rate case were to be modified by the Board in a way that REA would regard as a more appropriate calculation of airlines costs, I find it very hard to believe that it would be possible for REA to continue its present operations if it obtains nothing further from this case than what it already has, which is essentially what Examiner Keith has given us." (Service Tr. 19, J.A. 2024(a))

The Board, after thorough consideration, ruled that it was not in the public interest for air express service to continue. Once this decision was made, the issue of future rates became moot.

> "In respect to REA's insistence that we should have delayed acting in this proceeding until all issues in the Rates case were finally resolved, our Opinion and Supplemental Opinion discuss why that would have been futile. As we have said before, the low rates available under air express tariffs for some kinds of shipments are a strong consideration favoring the continuation of air express. But we previously concluded on the basis of the record then before us that air express could not be continued, and, as pointed out above, this conclusion has by no means been disproved by recent events. Thus awaiting the outcome of the Rates case would have served no purpose (even assuming that the record in the Rates case would have enabled us to establish an appropriate express rate level notwithstanding REA's apparent inability to provide meaningful cost data). The same is true in respect to the revenue division aspects of the Rates case, particularly since we concluded, and as REA has argued, that a change in divisions would not be enough to return the air express system to health." (Order 74-6-118 at 7, S.A. Sect. II, footnote omitted)

In reaching its decision, the Board considered many factors in determining whether it would be in the public interest to continue air express. One factor, as the quotation cited above indicates, was rates. The Board reasonably concluded that whatever decision was reached in the Rates case, air express should not continue.

Fourth, consolidation of the Rates and Service cases would have produced an unmanageable proceeding of massive proportions. */ REA in effect is telling this Court that not only should the Rates and Service cases have been consolidated, but also that the Freight Rate case should have been joined with the Rates case, and presumably,

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*/ In any event, the record in the Rates case is "woefully inadequate," partly as a result of REA's failures. REA simply was unable to supply considerable amounts of relevant data. (Service 0. 29, J.A. 692(a), n. 40) As the Board noted in the Rates decision,

> "The problem stems in part from the fact that REA does not report on a recurrent (or even sporadic) basis any detail for its air express revenues, expenses and investment, nor any such basic data as air express shipments, pieces and pounds, separately from such information for its surface express operations, much less on a more refined basis which would for example differentiate between system and domestic air express, or general commodity-rated and specific commodity-rated traffic.
>
> . . . .
>
> "Judge Shapiro directed REA to furnish monthly reports of air express traffic data until the Board's final decision in this investigation. In July 1971 REA requested permission to be relieved of this requirement. The request was denied by the Judge, but nevertheless REA unilaterally discontinued submitting the reports." (Rates 0. 5-6, J.A. 778(a)-779(a))

this joint proceeding combined with the Service case. The Board, weighing the interest of the parties in consolidation of these proceedings against the public interest in retaining a manageable format for the presentation of the many relevant issues, acted well within its discretion in separating the Service and Rates cases, and refusing to consolidate the Freight Rate and Rates cases. */

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*/ REA appeals Order 74-5-24, which denied REA's motion of January 31, 1974 to consolidate the Rates and Freight Rate cases. The Board acted well within its discretion in denying the motion to consolidate. As the Board concluded:

> "Consolidation would substantially broaden the scope of that already extremely complex proceeding which is concerned with the level and structure of air freight rates, and looks solely toward the making of determinations by the Board for future applicability only. On the other hand, the issue of divisions affects, for all practical purposes, only the past period, and moreover, does not directly involve the issue of freight rates. It is difficult to perceive how consolidation of the divisions question would do more than complicate and delay the resolution of the issues in both proceedings." (Footnote omitted)

III. The Board Properly Did Not Accept REA's "Reform Proposals" Because They Could Not Be Implemented Due To Airline Opposition And They Would Have Intensified REA's Monopoly.

Under the present express agreement, the rates which are embodied in the tariffs must have the approval of the airlines which are parties to the express agreement. The result is an express service rate structure that has limited REA to a relatively circumscribed role in the air cargo industry. To change this structure, REA requested independent rate authority, under which it could, subject only to Board review, alter the express service rate structure.

Granting REA's request for independent rate authority would not be a viable solution to REA's problems. The reason for this is quite simple. The airlines have consistently stressed that they would never enter an air express agreement with REA if REA has independent tariff authority. This is an entirely reasonable position since under REA's proposal the rates to be charged for shipments which the airlines would carry would be within the control of another company whose interest and cost structure

vary considerably from those of the airlines. */ Also, even if the airlines would agree to enter into air express agreements in which REA had independent tariff authority, significant problems would remain. First, granting REA independent rate authority would ensure continuing disputes between the airlines and REA since their interests differ considerably. Second, the grant of independent tariff authority would present significant regulatory problems. As the Board noted:

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*/ The divergent interests of REA and the airlines are reflected in their inability to reach agreement on the terms of air express. In its brief to this Court, REA nevertheless states:

> "In fact, the REA/airline partnership is far more harmonious than the Board's opinion would suggest." (p. 51)

This simply ignores reality. In 1970 REA itself characterized the impasse quite differently --

> ". . . the gulf between the parties which has persisted on the same issues during more than six months of negotiation indicates that these basic issues cannot be satisfactorily resolved without intervention by Board." (Petition of REA Express, Inc. at 5, Air Express Service, Docket 22096, J.A. 33(a))

> "Because of the nature of air express and of REA's operations, determinations of the reasonableness of air express rates even under the present simplified rate structure become an 'Odyssey of cost accounting,' . . . requiring cost and traffic data in extraordinary amounts and detail." (Service 0. 29, J.A. 692(a))

Granting REA's second major proposal, i.e., dual air express-air freight forwarder authority, would have even more serious consequences for the air freight industry. The Board stated:

> "With dual authority, REA could offer a full range of rapid delivery services -- including 'priority' services -- that could not be matched by any other forwarder. If this helped REA to dominate the entire indirect carrier industry, as it might, it would inevitably lessen competition among existing forwarders and, perhaps, sap the vitality of that group. Of course, that would thwart this agency's primary goal in licensing REA and the forwarders -- namely, to promote the vigorous development of air freight." (Service 0. 31, J.A. 694(a))

Moreover, there are other significant and persuasive reasons against the grant of dual air express-air freight forwarder authority. These are noted in the Board's order, and include the following:

1. Dual authority would reduce the extent to which the profitable air express traffic could cross-subsidize the unprofitable traffic.

2. The accounting difficulties would increase considerably.

3. Dual authority would cause serious public confusion among REA's customers on the nature of service and the proper rates.

4. Dual authority would divert REA's attention from small package and small community service for the same reason as a grant of independent rate authority would. (Service 0. 31-32, J.A. 694(a)-695(a))

Even if these reasons did not exist, a grant of dual authority would fail because of airline opposition. The airlines, as with independent rate authority, have indicated that they will not become parties to any express agreement if REA is granted air freight forwarder authority.

Finally, a grant of either independent tariff authority or dual authority would continue REA's monopoly control over air express. As noted earlier, this has always been an anomaly in the air transport system, in which the Board is enjoined to preserve "competition to the extent necessary . . . ."

IV. The Board Granted Forwarder Authority To REA Because It Actively Sought That Authority And, Indeed, REA Welcomed It When It Was Granted.

Emery supported the grant of air freight forwarder authority to REA. Emery believes that the Board correctly decided that despite REA's financial ill health and its present inability to function effectively as an indirect air carrier, it nevertheless should be given the opportunity to compete as an air

freight forwarder. REA actively sought this authority and indeed welcomed it when it was granted. Emery is of the opinion that there is a reasonable opportunity for REA to restructure its operations and to compete on an equal footing with other freight forwarders for its share of the market. This is an adequate and just solution to the complex problems presented by REA's financial decline and the termination of its air express monopoly and is fully in the public interest.

REA, however, now argues that the Board's award of air freight forwarding authority is merely a token and that it will not be able to make the shift to air freight forwarding. REA is in serious financial trouble; but the grant of air freight forwarding authority is REA's best chance to regain financial health.

> "It is by no means clear that REA is in fact unable to make the shift to air freight forwarder. REA has long sought forwarding authority. REA's chief executive officer has stated that absent major modifications of the airlines-REA relationship -- which modifications we found infeasible and contrary to the public interest -- REA 'would be better off as an air freight forwarder.' It has its long-standing customers and a staff fully familiar with the air cargo business. And REA has yet to explain why its existing equipment and facilities are not suitable for air freight forwarder operations. We discussed these same matters in our Supplemental Opinion, and there noted that REA's contentions that it could not promptly make the switch to air freight forwarder were without

factual support. Notwithstanding this invitation for hard evidence, REA's contentions on this point in its motion for stay are made without factual support other than references to its ongoing financial difficulties. But as we now discuss, to whatever extent that REA's financial problems indicate that the company may be too weak to shift to forwarder operations, there is considerably greater evidence that REA faces an imminent end if it does not change." (Order 74-6-118 at 2, S.A. Sect. II, footnote omitted)

CONCLUSION

For the foregoing reasons, the Board's Orders issued in the Express Service Investigation, the Express Rates Investigation, and the Discussions Concerning Industry-Wide Priority Air Cargo, should be affirmed.

Respectfully submitted,

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Dated: October 8, 1974

ADDENDUM

FEDERAL AVIATION ACT OF 1958

Section 101(3) (49 U.S.C. §1301(3)):

"Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

Section 102 (49 U.S.C. §1302):

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Section 412(b) (49 U.S.C. §1382(b)):

The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Section 1001 (49 U.S.C. §1481):

The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. . . .

Section 1006(e) (49 U.S.C. §1486(e)):

The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

1970 TRAFFIC DATA

SUMMARY OF U. S. DOMESTIC TRUNK & INTRA-HAWAIIAN AIRLINE TRAFFIC FOR 1970

	Total Ton-Miles Rev. Traffic	Available Ton-Miles Flown	% Available Ton-Miles Used
American	2,201,966,416	5,306,699,656	41.5
Braniff	426,081,670	1,026,385,420	41.5
Continental	515,879,159	1,273,885,980	40.5
Delta	1,167,904,535	2,636,093,183	44.3
Eastern	1,417,868,897	3,138,736,177	45.2
National	301,763,242	905,752,830	33.3
Northeast	209,138,189	604,406,498	34.6
Northwest	381,657,104	1,031,803,832	37.0
Pan American	300,349,829	537,248,180	55.9
Trans World	1,592,116,900	4,261,026,335	37.4
United	3,284,986,923	7,337,114,175	44.8
Western	542,472,516	1,179,705,096	46.0
TOTALS	12,342,117,360	29,238,257,304	42.2
	INTRA-HAWAIIAN SERVICE		
Aloha	13,990,481	31,533,630	44.4
Hawaiian	25,497,853	54,001,010	47.2
TOTALS	39,488,334	85,534,640	46.2

Source: Aviation Daily March 11, 1971

S.A. Sect. I

SUMMARY OF U.S. LOCAL SERVICE,
HELICOPTER, ALASKAN TRAFFIC 1970

	Total Ton-Miles Rev. Traffic	Available Ton-Miles Flown	% Available Ton-Miles Used
LOCAL SERVICE			
Air West	95,889,124	250,948,109	38.2
Allegheny	190,267,261	495,307,387	38.4
Frontier	119,620,723	306,909,450	39.0
Mohawk	65,654,638	146,443,050	44.8
North Central	91,551,307	237,367,323	38.6
Ozark	77,346,507	164,439,150	47.0
Piedmont	83,114,037	193,548,948	42.9
Southern	55,253,340	150,869,183	36.6
Texas Intl.	74,175,294	195,419,032	38.0
TOTALS	852,872,231	2,141,302,072	39.8
HELICOPTER SERVICE			
Chicago	22,395	42,035	53.3
Los Angeles	99,437	412,711	24.1
New York	508,281	1,129,129	45.0
San Francisco	396,003	1,154,589	34.3
TOTALS	1,026,116	2,738,464	37.5
ALASKAN SERVICE			
Alaska	67,930,511	127,199,219	53.4
Kodiak	135,570	411,276	45.1
Reeve	6,694,643	11,339,907	59.0
Western Alaska	138,194	238,775	57.9
Wien Consolidated	19,056,529	35,744,287	53.3
TOTALS	94,055,447	174,933,464	53.8

Source: Aviation Daily March 10, 1971

S.A. Sect. I

1970 TRAFFIC DATA

SUMMARY OF U. S. DOMESTIC TRUNK &
INTRA-HAWAIIAN AIRLINE TRAFFIC FOR 1970

	Total Ton-Miles Rev. Traffic	Available Ton-Miles Flown	% Available Ton-Miles Used
American	2,201,966,426	5,306,629,656	41.5
Braniff	426,021,670	1,026,325,420	41.5
Continental	515,879,159	1,273,135,980	40.5
Delta	1,167,304,535	2,636,893,123	44.3
Eastern	1,417,360,827	3,138,736,177	45.2
National	301,763,642	905,752,830	33.3
Northeast	209,139,189	604,406,498	34.6
Northwest	381,657,104	1,031,803,832	37.0
Pan American	300,349,819	537,248,180	55.9
Trans World	1,592,116,900	4,261,026,335	37.4
United	3,284,986,983	7,337,114,179	44.8
Western	542,472,516	1,179,705,096	46.0
TOTALS	12,342,217,380	29,838,857,304	42.2
INTRA-HAWAIIAN SERVICE			
Aloha	13,990,481	31,533,630	44.4
Hawaiian	25,497,853	54,001,010	47.2
TOTALS	39,488,334	85,534,640	46.2

Source: Aviation Daily March 11, 1971

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SUMMARY OF U.S. LOCAL SERVICE,
HELICOPTER, ALASKAN TRAFFIC 1970

	Total Ton-Miles Rev. Traffic	Available Ton-Miles Flown	% Available Ton-Miles Used
LOCAL SERVICE			
Air West	95,889,124	250,948,109	38.2
Allegheny	190,267,861	495,307,387	38.4
Frontier	119,620,723	306,909,450	39.0
Mohawk	65,694,638	146,443,050	44.8
North Central	91,551,307	237,397,383	38.6
Ozark	77,346,507	164,489,150	47.0
Piedmont	83,114,037	195,543,943	42.9
Southern	55,251,340	150,869,123	36.6
Texas Intl.	74,175,894	195,419,032	38.0
TOTALS	852,975,231	2,141,303,072	39.8
HELICOPTER SERVICE			
Chicago	22,395	42,035	53.3
Los Angeles	99,437	412,711	24.1
New York	508,281	1,109,109	45.0
San Francisco	396,003	1,154,509	34.3
TOTALS	1,026,116	2,718,464	37.5
ALASKAN SERVICE			
Alaska	67,930,511	127,199,219	53.4
Kodiak	135,570	411,276	45.1
Reeve	6,694,643	11,339,907	59.0
Western Alaska	138,194	238,775	57.9
Wien Consolidated	19,056,529	35,744,287	53.3
TOTALS	94,055,447	174,933,464	53.8

Source: Aviation Daily March 10, 1971

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UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 26th day of June, 1974

EXPRESS SERVICE INVESTIGATION	Docket 22388

ORDER DENYING MOTION FOR STAY
OF ORDERS 73-12-36 AND 74-5-25

In our Opinion 1/ and Supplemental Opinion 2/ in this proceeding we concluded that (1) as a practical matter air express in anything resembling its present form cannot long survive; (2) any attempt by the Board to change the airline-REA air express relationship in order to restore the air express system, and REA, to viability would not work and in any case would not be in the public interest; and (3) because of the vast changes in the air cargo industry since the birth of air express, termination of the arrangement will not deprive the public of any unique benefits (even assuming that Board action could prevent the demise of air express). Accordingly, we granted REA nationwide air freight forwarder authority and provided that the air express system, and REA's authority as the air express ground agent, would end upon the commencement by REA of air freight forwarder operations, but in no event later than July 31, 1974.

REA now asks that we stay the effective date of our Orders pending judicial review. 3/ REA claims that the likelihood is that our decision will be reversed, and that a stay is necessary to prevent irreparable injury to the public interest, to REA's customers and creditors, to REA employees and to REA itself.

The Pet Industry Parties have filed an answer in support of REA's motion for stay. Emery Air Freight Corporation, the Air Freight Forwarders Association and United Air Lines have filed answers in opposition to the stay. A pleading by the Participating Airlines appears to indicate that 24 of the airlines presently participating in the air express arrangement favor grant of the

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1/ Order 73-12-36.
2/ Order 74-5-25.
3/ Although REA in terms has requested in Docket 22388 only a stay of Order 74-5-25, we shall treat its motion as encompassing as well a request to stay our decision in Order 73-12-36. REA also asks that we stay the effectiveness of our order in the Investigation of Air Express Rates case, Order 74-5-23. We deal with that aspect of REA's motion in a separate order.

stay, while several others (in addition to United) do not. Finally, REA has filed a reply to the answers of Emery and the Air Freight Forwarders Association. 4/

We have decided not to grant the stay sought by REA because it is our judgment that delaying the implementation of our decision will work to the advantage of neither the public interest nor REA.

We turn first to REA's contention that our decision, if not stayed, will result in REA's demise.

To begin with, we cannot accept REA's claim that although it is in sufficiently good economic shape to remain viable if our decision in this proceeding is stayed, it nevertheless cannot make a changeover to air freight forwarder operations, and that the implementation of our requirement that it make the change would mean the end of REA.

In our view the facts at hand show that REA's chances of staying alive are better as an air freight forwarder than as ground agent for air express, and that the probability of REA being able to make the switch is higher if it does so now than if it waits. Indeed, REA's request for a stay seems more of an expression of REA's reluctance to break with the past than an assessment of the precarious realities REA faces.

It is by no means clear that REA is in fact unable to make the shift to air freight forwarder. REA has long sought forwarding authority. REA's chief executive officer has stated that absent major modifications of the airlines-REA relationship -- which modifications we found infeasible and contrary to the public interest -- REA "would be better off as an air freight forwarder." It has its long-standing customers and a staff fully familiar with the air cargo business. And REA has yet to explain why its existing equipment and facilities are not suitable for air freight forwarder operations. We discussed these same matters in our Supplemental Opinion, 6/ and there noted that REA's contentions that it could not promptly make the switch to air freight forwarder were without factual support. Notwithstanding this invitation for hard evidence, REA's contentions on this point in its motion for stay are made without factual support other than references to its ongoing financial difficulties. But as we now discuss, to whatever extent that REA's financial problems indicate that the company may be too weak to shift to forwarder operations, there is considerably greater evidence that REA faces an imminent end if it does not change.

In our Opinion in this proceeding we referred to the deterioration of REA's financial position noting, among other things, that in the seven years ended December 1972 REA lost about 68 million dollars, and that its liabilities far exceed its assets. Things have not gotten any better for REA. It lost

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4/ We will grant REA's motion to file this otherwise unauthorized document.

5/ Hearing Tr. at 920.

6/ At p. 17.

$8,500,000 in 1973 and has been losing money at just as fast a pace this year. REA's operating losses during the first quarter of 1974 were $1,686,000, slightly more than its losses in the same period in 1973.7/ The continuation of severe losses this year comes despite sharp increases in air express rates and the percentage of air express revenues going to REA. A major part of the problem seems to be a very substantial decline in shipments compared to last year. (For instance, REA advises that April air express shipments were down 16 percent.)8/

REA states that a further rate increase will return it to profitability. However REA has made the same claim with respect to several recent rate increase filings and they have been shown to have been erroneous. Moreover, the assumptions upon which REA's forecast is based are badly in error, including traffic predictions that are overstated 9/ and overly optimistic cost projections. The fact is that REA's financial position, if it continues to operate as air express ground agent, is soon going to be untenable. Even if REA's losses were to continue at only their present pace, the increasing gap between REA's liabilities and cash needs, on the one hand, and its assets and revenues, on the other, spell imminent disaster. Thus even REA's supporters among the airlines state that if the Board were to grant a stay in this proceeding, our order should "provide expressly . . . that it shall be without prejudice to the right of the airlines . . . to terminate air express service forthwith in the event REA should default in any payment due the airlines thereunder."10/

Furthermore, REA's contentions about its continued viability as air express ground agent rest on the assumption that the air express system, upon which REA is at present almost wholly dependent, can continue on as is for at least the period in which the court has our decision under review. But the facts have already shown that assumption to be in error. On June 14 Delta Air Lines and Southern Airlines stopped handling air express shipments and thus air express ceased being a service of all the domestic carriers. (Such action was in accordance with tariff

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7/ REA nonetheless states that it "made a $400,000 profit in March and it appears that it also made a substantial profit in April." (Motion for Stay at p. 23.) However REA provides no backup figures at all for that statement. Moreover, the statement is difficult to accept at face value since it is so inconsistent with the data and projections included in REA's most recent tariff filing. Even assuming the accuracy of the statement, however, it suggests only that REA may have enjoyed a brief and not to be repeated respite from its saga of endless losses. If there has been such a respite, and if it is to be given any significance at all, it suggests only that because REA's cash drain was stopped for at least a brief period its chances of shifting to air freight forwarder operation are somewhat better than might otherwise be expected.

8/ Traffic and financial figures are from REA's recent tariff filing. REA has asked that those figures be incorporated by reference into its pleadings on the motion for stay. See affidavit of REA's Vice President-Finance attached to REA's Reply.

9/ Thus REA assumes that the rate increase will have no effect on traffic volume (i.e., perfect inelasticity of demand). Such an assumption is on its face an erroneous one. Moreover REA's own evidence in the proceeding makes the point that the demand for air express service is significantly elastic: See, Statement of Witness Nelson at 11.

10/ Answer of Participating Airlines to Motion of REA Express Inc., for Stay, at 5.

filings by the two airlines. REA filed no objection to those tariff changes.) North Central and Northwest are next, with their air express service due to stop on July 2 and July 31, respectively. And United -- the nation's largest carrier -- has unequivocally stated that it will terminate its connection with air express in November, which is as soon as the notification requirements of the air express agreements permit. 11/ The effect of these carrier actions is to entirely preclude some shipments from moving by air express (but not by air freight) and in many other cases to greatly add to REA's difficulties and to consumer dissatisfaction with air express. Delta and Southern alone, after all, provide the only direct service in a number of significant markets, and a major part of the capacity in others.

In light of all of the foregoing considerations, we cannot conclude that a failure to stay our decisions in this proceeding will do irreparable injury to REA: A stay will not save REA, and a prompt shift from express ground agent to air freight forwarder is more likely to help REA than to hurt it. There is no guarantee, of course, that REA will be able to avoid demise by switching to air freight forwarder operations. But in our judgment its chances for life are considerably greater as a forwarder than as air express ground agent; and as discussed above the sooner the shift is made the more likely its chances of success.

The claims of irreparable injury to REA's employees, customers and creditors rest upon REA's statements that it would be able to continue in existence if the Board's decision is stayed, but that it will have to stop if the Board's order becomes effective. As stated above, we disagree with both lines of that argument. If we are correct in our view that REA's best chance for continued viability is to shift promptly to air freight forwarder operations, a grant of REA's motion for stay would do more harm than good for REA's employees, customers, 12/ creditors, and any others who may be dependent upon REA's continued existence.

Similar considerations also apply in respect to the public generally. The very purpose of this proceeding was to determine what Board action would be most in the public interest in respect to the indirect air carrier authority of REA express and the related agreements between the various

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11/ The agreements provide for a six-month notice-of-termination period. United gave its notice on May 22, 1974. The Board is advised that Piedmont presented its notice of termination shortly after United did, thus enabling it to withdraw from air express service on November 29. A listing of points served only by Delta, North Central, Northwest and Southern, and some major markets served by those carriers, is attached as an appendix.

12/ In this context we include REA's surface and international air freight forwarder customers as well as air express shippers.

airlines and REA. We concluded that the nation's shippers will be better served when air express is ended, and that prompt termination of REA's express ground agent authority and the air express agreements is in order. We remain of that view. In respect to REA's motion for stay, since a stay will not preserve REA's existence as express ground agent, and since a prompt shift by REA to air freight forwarder operations offers REA the best chance of continued viability, we believe that the interests of the public, as well as those of REA, would be disserved by a grant of REA's motion for stay.

We turn now to REA's argument that our decision is unsupportable and that REA will succeed in obtaining a reversal of the Board's decision on review.

Ultimate determination of whether the Board's actions in this proceeding were a proper exercise of its responsibilities will, of course, be for the courts to decide. However, as we view the matter, there has been no showing that our decision in this proceeding is likely to be overturned on review.

At the outset we note that REA argues that the Board's decision is legally deficient in that it failed to consider the Administrative Law Judge's initial decision and shipper testimony, presumably because the conclusions reached in such decision and testimony differed from those reached by the Board. The Board thoroughly considered the Judge's findings and conclusions, together with the record, as witnessed by the numerous references in our Opinions thereto.

REA again contends that the Board could not validly terminate the present air express arrangement until a substitute has been effected, and that the Board erred in not consolidating the airline discussions in Docket 26238 13/ with this proceeding. However, we have discussed elsewhere why we concluded that awaiting the further development of alternatives to air express services is infeasible and not in the public interest: See, for example, Supplemental Opinion at pp. 8 and 10. Similarly, REA's contentions with respect to the Board's alleged error in not consolidating the airline discussion in Docket 26238 with this proceeding have been previously raised by REA, and rejected by the Board.14/

13/ In the Matter of the Petition of the Airlines Participating in Air Express Service for authorization of inter-carrier discussions concerning the creation of an industry-wide priority cargo service.

14/ See Orders 74-2-118, February 27, 1974, 74-4-1, April 1, 1974, and 74-5-74, May 14, 1974.

REA also contends that the Ashbacker principle requires that the Board give comparative consideration to REA's current air express service and the priority service that the airlines must provide since the services are mutually exclusive. REA maintains that the Board's failure to do so, and the Board's failure to include REA as a party to the air carrier discussions, supra, have deprived REA of procedural due process and amount to an unconstitutional taking of its property.15/ The Board cannot acquiesce in these contentions. In our view, REA has been accorded every procedural right. The Express Service Investigation was a most comprehensive evidentiary proceeding, in which the Board considered various forms of "express" service, including REA's, and in which REA was provided with every opportunity to present its case. In our view, the gravamen of REA's Ashbacker contention is not that the Board denied it a comparative hearing on this matter, but that, after hearing, the Board rejected REA's proposal. Furthermore, the airline discussions, to which REA repeatedly refers, have nothing to do with Ashbacker. They merely represent an effort on the part of the airlines to implement the Board's determination in the Service Investigation placing the airlines under an obligation to offer shippers an extra-fast airport-to-airport service. In any event, and as we have repeatedly said in our previous Opinions16/, the Board's decision does not in any way exclude REA from an equal and virtually unlimited participation in the air freight market with other indirect air carriers. In fact, as an air freight forwarder, REA will be able to offer whatever services it now offers as the air express ground agent. Finally, REA's contentions regarding the Board's failure to include REA as a party to the airlines' discussions have been previously raised by REA, and have also been rejected by the Board.17/

REA also argues that our decision will be overturned as based on speculation rather than fact. REA insists that we are precluded as a matter of law from ending our approvals of the air express agreements until we have passed upon air express rate levels and REA-airline division arrangements in the Investigation of Air Express Rates case. As discussed in our Supplemental Opinion, however, these arguments miss the point. The facts are clear, and indeed are not even seriously in dispute, that

15/ In a similar vein, REA contends that the presence of Board observers at the airline discussions prejudices its rights by exposing the Board to the ex parte views of the airlines. We perceive no prejudice. Moreover, the presence of observers is desirable in the public interest to ensure that the discussions are conducted within the guidelines established by the Board.

16/ See, e.g. Order 73-12-36, pp. 8, 20-21, 38 and, Order 74-5-25, pp. 5 and 8.

17/ See, note 14, supra.

the air express system in its historic form cannot continue. Thus a break with the past is inevitable. In these circumstances prediction of the likely effects of at least partially untested ways of providing service to the public -- or what REA calls "speculation" -- becomes unavoidable; and we reject REA's thesis that we are legally precluded from acting on our judgment of what the future is likely to bring.

In respect to REA's insistence that we should have delayed acting in this proceeding until all issues in the Rates case were finally resolved, our Opinion and Supplemental Opinion discuss why that would have been futile. As we have said before, the low rates available under air express tariffs for some kinds of shipments are a strong consideration favoring the continuation of air express. But we previously concluded on the basis of the record then before us that air express could not be continued, and, as pointed out above, this conclusion has by no means been disproved by recent events. Thus awaiting the outcome of the Rates case would have served no purpose (even assuming that the record in the Rates case would have enabled us to establish an appropriate express rate level notwithstanding REA's apparent inability to provide meaningful cost data). The same is true in respect to the revenue division aspects of the Rates case, particularly since we concluded, and as REA has argued,18/ that a change in divisions would not be enough to return the air express system to health.

18/ See, e.g., Oral Argument Tr. at 19; (per counsel for REA) "I find it very hard to believe that even if the Examiner's decision in the rate case were to be modified by the Board in a way that REA would regard as a more appropriate calculation of airlines costs, I find it very hard to believe that it would be possible for REA to continue its present operations if it obtains nothing further from this case than what it already has, which is essentially what Examiner Keith has given us."

Lastly, REA's motion for a stay urges that the Board's decision in this proceeding amounts to a "major federal action significantly affecting the quality of the human environment" and therefore an environmental impact statement is required by Section 102(2)(c) of the National Environmental Policy Act. In making this assertion for the first time, REA offers nothing to support its claim that the Board's action will significantly affect the quality of the human environment. We have examined the matter and find REA's allegation without merit.

To establish our obligations under Section 102(2)(c) of the Act, we must measure the effect of our action upon the quality of the human environment, mindful that the word "significantly" in that section establishes a threshold of importance or impact that must be met before a statement is required. This action has no significant consequences.

As an air freight forwarder, REA will operate the same trucks it now uses to provide air express service. The same REA vehicles which once provided air express service will now provide air freight forwarding service, or the service will be provided by another air freight forwarding operator (Op. 18-19). REA asserts that the Board's order would result in the operation of additional vehicles which would add congestion at airports. However, there is no reason to believe that this result would occur, and, if it did, that it would have any significant environmental consequences.

To summarize, we find nothing in the record or any other basis for believing that our action (1) will cause adverse environmental effects in excess of those created by existing uses in the affected areas or (2) has an absolute quantitative adverse environmental effect, including any cumulative harm resulting from a contribution to existing adverse conditions or uses in the affected areas. Undoubtedly, there are a number of actions which the Board may take which will require preparation of environmental impact statements. We clearly understand our continuing duty under the Act to carry out its purposes and policies to the fullest extent possible. That obligation, however, does not require the preparation of an impact statement where, as here, we find that the effect of our action is environmentally insignificant.

ACCORDINGLY, IT IS ORDERED THAT:

1. The motion of REA Express Inc., for leave to file an unauthorized document, dated June 11, 1974, be and it hereby is granted; and

2. The motion of REA Express Inc., for stay of Orders 73-12-36 and 74-5-25 be and it hereby is denied.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

S.A. Sect. II

TABLE I

Examples of Markets in which Delta, North Central, Northwest, or Southern provide the only direct service

Columbus, Ga.-Washington, D. C.	(SO)
Memphis-New Orleans	(DL, SO)
Memphis-Chicago	(DL, SO)
Memphis-St. Louis	(DL, SO)
Memphis-Miami	(DL)
Memphis-Indianapolis	(DL)
Minneapolis/St. Paul-Portland	(NW)
Minneapolis/St. Paul-Spokane	(NW)
Atlanta-Savannah	(DL)
Atlanta-Cincinnati	(DL)
Atlanta-Detroit	(DL)
Atlanta-Charleston, S. C.	(DL)
Kansas City-Sioux City	(NC)

Examples of Top REA Markets in which Delta, North Central, Northwest, and/or Southern Provide at least Half of the Daily Direct Frequencies

Market	Delta	North Central	Northwest	Southern
Chicago-Minneapolis-St. Paul			X	
Chicago-New Orleans	X			X
Chicago-Cincinnati	X			
Chicago-Louisville	X			
Chicago-Atlanta	X		X	X
Chicago-Miami	X		X	
New York City-Minneapolis-St. Paul		X	X	
Cleveland-Detroit	X	X	X	
Indianapolis-Detroit	X			

NOTE: Each of the above markets is one of REA's top 100 markets: See Exh. REA 209.

Table III

Monopoly points: Delta, North Central, Northwest, and Southern *

1. Delta

Manchester, NH

Brunswick, GA

Bangor ME

Portland, ME

Presque Isle, ME

2. Northwest

Fargo, ND (with North Central)

Jamestown, ND

Grand Forks, ND (with North Central)

3. Southern

Anniston, AL

Decatur, AL

Dothan, AL
Florence, NC
Gadsden, AL

Mobile, AL

Tuscaloosa, AL

Elgin Air Force Base, FL

Albany, GA

Athens, GA

Moultrie--Thomasville, GA

Valdosta, GA

Columbus, MS

Greenville, MS

Greenwood, MS

Gulfport/Biloxi, MS

Hattiesburg, MS

Laurel, MS

Natchez, MS

Tupelo, MS

University/Oxford, MS

Anderson, SC

Greenwood, SC

Jackson, TN

Shelbyville/Tullahoma, TN

Meridian, MS (with Delta)

* Table III does not reflect points at which these carriers are now suspended or points in issue in the New England Service Investigation.

Table III (continued)

Monopoly points: Delta, North Central, Northwest, and Southern

4. North Central

Alpena, Mich.
Benton Harbor/St. Jos., Mich.
Escanaba, Mich.
Hancock/Houghton, Mich.
Ironwood/Ashland, Mich.
Iron Mountain/Kingsford, Mich.
Manistee/Ludington, Mich.
Kalamazoo/Battle Creek, Mich.
Marquette, Mich.
Marinette/Menominee, Mich.
Pellston, Mich.
Saulte Ste, Marie, Mich.
Traverse City, Mich.
Bemidji, Minn.
Brainerd, Minn.
Chisholm/Hibbing, Minn.
Duluth/Superior Minn.
International Falls, Minn.
Fairmont, Minn.
Mankato, Minn.
Thief River Falls, Minn.
Winona, Minn.
Worthington, Minn.
Norfolk, Neb.
Devils Lake, N.D.
Fargo/Moorehead, N.D. (Fargo with NWA)
Aberdeen, S. D.
Brookings, S.D.
Huron, S.D.
Mitchell, S.D.
Watertown, S.D.
Yankton, S.D.
Beloit/Janesville, Wis.
Eau Claire, Wis.
Green Bay/Clintonville, Wis.
La Crosse, Wis.
Manitowoc/Sheboygan, Wis.
Oshkosh/Appleton, Wis.
Rhinelander/Land O'Lakes, Wis.
Wausau/Stevens Point, Wis.
Rapids/Marshfield, Wis.

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of October, 1974, caused to be served, by first-class mail, postage prepaid, copies of the foregoing Brief for Intervenor Emery Air Freight Corporation upon the following:

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October 8, 1974